COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS

In Re: Hudson Public Schools **BSEA # 11-6562**

DECISION

This decision is issued pursuant to the Individuals with Disabilities Education Act (20 USC 1400 *et seq*.), Section 504 of the Rehabilitation Act of 1973 (29 USC 794), the state special education law (MGL c. 71B), the state Administrative Procedure Act (MGL c. 30A), and the regulations promulgated under these statutes.

A hearing was held on July 6, 2011 in Malden, MA before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

Student	
Student's Mother	
Student's Father	
Kathleen Rielly	Special Educator, Integrated Center for Child Development
Ann Cleary	Occupational Therapist, Hudson Public Schools
Lida Tabrizi	Special Education Teacher, Hudson Public Schools
Julianne Locke	School Psychologist, Hudson Public Schools
Karen Waddill	Assistive Technology Consultant, Cotting School
Julianna Bahosh	Director of Pupil Services, Hudson Public Schools
Mary Ellen Sowyrda	Attorney for Hudson Public Schools
Sarah Catignani	Legal Intern with Hudson's Attorney
Darlene Coppola	Court Reporter

The official record of the hearing consists of documents submitted by the Parents and marked as exhibits P-1 through P-63; documents submitted by the Hudson Public Schools (Hudson) and marked as exhibits S-1 through S- 13; and approximately six hours of recorded oral testimony and argument. As agreed by the parties, written closing arguments were received by July 20, 2011, and the record closed on that date.

ISSUES

The issues to be addressed at hearing, as agreed by the parties, are as follows:

1. Whether Hudson must prospectively provide Student with occupational therapy for a half hour each week.
2. Whether Hudson should have provided Student with occupational therapy for a half hour each week since October 21, 2009; and if so, whether Student is entitled to

compensatory relief; and if compensatory relief is due, what that relief should consist of.

3. Whether Student's IEP should be amended to include a goal (and related benchmarks) to address spelling issues of concern to Parents.
4. Whether Hudson prospectively has an assistive technology consultant with sufficient qualifications to provide appropriate services to Student; and if not, what are the minimum qualifications of such a person.
5. Whether Hudson may be required to have its special education staff take a course entitled "Basic Rights Denial" that would be taught by an advocate chosen by Parents.

FACTUAL BACKGROUND

Student is a thirteen-year-old young man who lives with his Parents in Hudson, MA. He will attend the 8th grade at the Hudson High School in the fall.

Student enjoys school and is a motivated learner. He is interested in all school subjects but particularly likes music and using his home computer.

Student has been diagnosed with a neurological disability that manifests itself in difficulties with organization, handwriting, spelling and processing speed.

His most-recently proposed IEP (for the period 4/13/11 to 4/12/12) calls for Student to be placed in a full inclusion program where he receives the following special education instruction within the general education classroom:

> Assistive technology consultation for an hour, twice per month.
> Special education instruction in writing for a half hour, four times per six-day cycle.

The IEP also proposes the following pull-out special education services:

> Assistive technology support for 40 minutes, once per six-day cycle.
> Special education instruction in spelling for 40 minutes, twice per six-day cycle.

Exhibit S-7.

DISCUSSION

It is not disputed that Student is an individual with a disability, falling within the purview of the federal Individuals with Disabilities Education Act (IDEA)[1] and the Massachusetts special education statute.[2]

The IDEA was enacted "to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education,

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[1] 20 USC 1400 *et seq*.
[2] MGL c. 71B.

employment, and independent living."[3] FAPE must be provided in the least restrictive environment.[4]

Student's right to FAPE is assured through the development and implementation of an individualized education program or IEP.[5] Each IEP must be "custom tailored to address the handicapped child's unique needs in a way reasonably calculated to enable the child to receive educational benefits."[6]

FAPE does not require Hudson to provide special education and related services that will maximize Student's educational potential.[7] Similarly, the educational services need not be "the only appropriate choice, or the choice of certain selected experts, or the child's parents' first choice, or even the best choice."[8]

FAPE addresses the importance of a student's receiving sufficient special education and related services to allow access to what is being taught in school. As the Supreme Court has explained, "Congress sought primarily to make public education available to handicapped children and to make such access meaningful."[9] Similarly, the Supreme Court has held that the IEP must be "reasonably calculated to enable the child to receive educational benefits."[10] And, "meaningful progress … is the hallmark of educational benefit under the [federal] statute."[11]

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[3] 20 USC § 1400(d)(1)(A).
[4] 20 USC § 1412(a)(5).
[5] 20 USC 1414(d)(1)(A)(i)(I)-(III).
[6] *Lenn v. Portland Sch. Comm.,* 998 F.2d 1083, 1086 (1st Cir.1993) (internal quotations and citations omitted). See also *Lessard v. Wilton Lyndeborough Cooperative School Dist.,* 518 F.3d 18, 23 (1st Cir. 2008) (noting the school district's "obligation to devise a custom-tailored IEP").
[7] *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley,* 458 U.S. 176, 197, n.21 (1982) ("Whatever Congress meant by an "appropriate" education, it is clear that it did not mean a potential-maximizing education.").
[8] *G.D. v. Westmoreland Sch. Dist.,* 930 F.2d 942, 948 (1st Cir. 1991). See also *Lt. T.B. ex rel. N.B. v. Warwick Sch. Com.,* 361 F.3d 80, 83 (1st Cir. 2004) ("IDEA does not require a public school to provide what is best for a special needs child, only that it provide an IEP that is 'reasonably calculated' to provide an 'appropriate' education as defined in federal and state law.").
[9] *Irving Independent School District v. Tatro*, 468 U.S. 883, 891 (1984) (internal quotations omitted), quoting *Rowley,* 458 U.S. at 192.
[10] *Rowley*, 458 U.S. at 207, quoted in *Lessard v. Wilton-Lyndeborough Coop. School Dist.,* 518 F.3d 18, 27 (1st Cir. 2008) (1st Cir. 2010).
[11] *DB v. Sutton,* 07-cv-40191-FDS (D.Mass. 2009). See also *Houston Independent School Dist. v. VP*, 2009 WL 1080639 (5th Cir. 2009) (after reviewing *Rowley* standard, concluding that IEP must be reasonably calculated to provide "meaningful educational benefit"); *Lauren P. v. Wissahickon School Dist.*, 2009 WL 382529 (3rd Cir. 2009) (IEP must confer "significant learning" and "meaningful benefit" on student); *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir. 2004) ("state must provide children with 'meaningful access' to public education"); *Alex R.. v. Forrestville Valley Community Unit School Dist. # 221,* 375 F.3d 603, 612 (7th Cir. 2004) (question presented is whether the school district appropriately addressed the student's needs and provided him with a meaningful educational benefit), *cert. denied*, 543 U.S. 1009 (2004); *Deal v. Hamilton County Board of Education,* 392 F.3d 840 (6th Cir. 2004); *Shore Regional High School Bd. of Educ. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004); *L.E. v. Ramsey Bd. of Educ*., 435 F.3d 384, 395 (3d Cir. 2006), citing *T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ*., 205 F.3d 572, 577 (3d Cir. 2000) (phrase "some educational benefit", as utilized by Supreme Court in *Rowley*, requires provision of a "meaningful educational benefit"); *Adams v. Oregon*, 195 F.3d 1141, 1145 (9th Cir. 1999); *Town of Burlington v. Dep't of Educ*., 736 F.2d 773, 789 (1st Cir. 1984) ("federal basic floor of meaningful, beneficial educational opportunity"), *aff'd* 471 U.S. 359 (1985); *Hunt v. Bureau of Special Education Appeals*, 109 LRP 55771, CA No. 08-10790-RGS (D.Mass. 2009) ("School districts provide a FAPE by designing and implementing

As will be discussed below, Parents have taken the position that Student is entitled to receive the related service of occupational therapy. In order for a student to receive FAPE, related services are required to the extent that those services are necessary in order for the student to learn, to benefit from his special education or to gain meaningful access to his education.[12]

In the instant dispute, Parents have the burden of persuasion that Hudson's proposed IEP is not appropriate.[13]

The first and second issues in dispute pertain to whether Student was entitled to receive occupational therapy (OT) services from October 21, 2009 to the present, and whether prospectively, Student is entitled to OT services in order to receive FAPE.

Student's need for OT services was considered by BSEA Hearing Officer Sara Berman in a decision dated October 21, 2009.[14] After hearing evidence, including testimony from Hudson's occupation therapist (Ann Cleary who also testified in the instant dispute), Hearing Officer Berman concluded that Hudson was not required to provide Student with OT in order for him to receive FAPE. In reaching this conclusion, Hearing Officer Berman noted that Ms. Cleary, who is a highly-experienced, masters-level certified occupational therapist, had evaluated Student on two occasions, had observed him in class, and had consulted with his teachers. It is apparent that in the previous dispute, Ms. Cleary credibly and persuasively testified that no OT services were needed. Although Parents put into evidence a report (and testimony by the author of that report) recommending OT services, HO Berman concluded that Parents had not provided sufficient evidence or argument to rebut Ms. Cleary's recommendations, and therefore found in favor of Hudson on this issue. None of the IEPs at issue in the instant dispute were considered by HO Berman. Exhibit P-4.

Up until the date of the October 21, 2009 BSEA decision, Student had continued to receive direct OT services from Ms. Cleary pursuant to Student's stay-put rights. Those services were discontinued when HO Berman determined that Student did not require OT services in order to receive FAPE. Testimony of Cleary.

The instant dispute presents the question of whether in light of more recent evidence regarding Student's needs in this area, Student's need for (and right to) OT services has changed since HO Berman's decision.

It is not disputed that Student has certain weaknesses relative to his fine motor skills. For example, Student has demonstrated below average bilateral coordination and decreased

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an IEP 'reasonably calculated' to insure that the child receives meaningful 'educational benefits' consistent with the child's learning potential" citing *Rowley*).

[12] See *In Re: Shrewsbury Public Schools*, BSEA 10-1237 (ruling), 16 MSER 60 (2/18/10) (explaining legal standard for receipt of related services and discussing relevant case law).

[13] *Schaffer v. Weast*, 546 U.S. 49, 62 (2005) (burden of persuasion in an administrative hearing challenging an IEP is placed upon the party seeking relief; a party who has the burden of persuasion "loses if the evidence is closely balanced").

[14] *In Re: Hudson Public Schools*, BSEA # 093743, 09-3839, 09-5568 (2009).

visual motor skills. This is reflected within a November 2, 2010 occupational therapy evaluation that Parents obtained from Franciscan Hospital for Children. Exhibits P-35; S-10.

The Franciscan report explained that clinical observation, standardized testing and caregiver report were used to evaluate Student and make recommendations for OT services. The report considered Student's sensorimotor skills, his fine motor skills, his visual perception skills, his visual skills, and his functional skills. The evaluation did not recommend any direct OT services, but rather proposed a half hour per month OT consultation with the classroom teacher, "with focus on visual perceptual accommodations and environmental accommodations, as well as visual motor performance and possible activities and accommodations to promote progress." The report also recommended a half hour per month consult with the assistive technology teacher "with focus on keyboarding techniques and possible accommodations." Finally, the report recommended continued keyboarding practice and a number of accommodations. Exhibits P-35; S-10.

As noted above, in order to have the right to occupational therapy services under FAPE, it is necessary but not sufficient that there exist fine motor deficits. This is because Student has the right to receive OT services only if necessary in order for Student to learn, to benefit from his special education or to gain meaningful access to his education. There is no evidence that, as a result of his fine motor weaknesses, Student has any of these functional or practical limitations related to his learning.

Ms. Cleary testified that her most recent evaluation in March 2010, her observations of Student at school (which included the opportunity to work with Student in the classroom once per week during 3rd grade, during 4th grade, during 5th grade, as well as a period of time during 6th grade), and her frequent and continuing contacts with Student's teachers through the present all indicated that Student is not limited in school (either in terms of educational progress or access to the curriculum) by the weaknesses noted in the Franciscan report. She concluded that Student has functional fine motor skills. Ms. Clearly testified credibly and persuasively.

Parents seek to rely on the Franciscan report to establish Student's need for OT services. However, the Franciscan evaluation report concluded that Student "demonstrated functional fine motor skills". Exhibits P-35 (page 6); S-10 (page 6). Moreover, the author of the Franciscan report did not testify, nor did Parents have any other expert explain the report. It was not possible to determine the experience or expertise of the evaluator, to determine the author's understanding, if any, of Student's likely difficulties in school as a result of his fine motor weaknesses, or to ask questions to clarify recommendations made in the evaluation. And, the report, on its face, does not indicate that the evaluator had sufficient information to determine how Student's OT deficits would likely impact his ability to access the curriculum or make progress within the Hudson schools. All of this significantly limited the probative value of the report. Parents provided no other expert report or testimony supporting their request for OT services.

Parents' related concern is Student's handwriting weakness. But, again, there is no probative evidence in support of specialized instruction or related services to address this weakness. Specifically, the Franciscan report stated: "At [Student's] age, it is likely that he has

established his handwriting patterns and services are not recommended to address handwriting." Exhibits P-35 (page 10); S-10 (page 10). Similarly, in Ms. Cleary's March 2010 evaluation, she specifically evaluated Student's handwriting skills and concluded that occupational therapy services were not recommended, but she provided specific suggestions to work on handwriting weaknesses in daily classroom work. She further testified that since her evaluation, Student's handwriting had improved to the point where there are no current concerns in this area. Testimony of Cleary; exhibit S-7.

For these reasons, I find that Parents have not met their burden of establishing that presently (or in the past, since October 21, 2009) Student needs (or has needed) OT direct services or OT consultation in order to receive FAPE.

The next issue in dispute is whether Student's IEP should be amended to include a goal (and related benchmarks) to address spelling issues of concern to Parents. The currently-proposed IEP includes the following spelling goal: "[Student] will improve his spelling skills as measured by the benchmarks stated below." The benchmarks involve increasing spelling accuracy by 75% when given a dictated list of words involving a combination of sight words, common words and phonics-based words. Exhibit S-6.

Kathleen Rielly, EdS, MEd, testified on behalf of Parents on this issue. She has been a special educator for 27 years (most recently with the Wellesley Public Schools for ten years working with children with intensive special education needs) and, for the past three years, has worked at Integrated Center for Child Development. She has expertise as an assistive technology specialist. In her testimony, Ms. Rielly reviewed two evaluations, one in November 2008 and another one more recently in December 2010, which considered Student's spelling skills. The evaluations provided consistent results, indicating substantial deficits in this area. As a result, Hudson has included within its currently-proposed IEP, special education services of 40 minutes, twice per six-day cycle, to work on Student's spelling deficits. Ms. Rielly testified in support of this level of services, as well as the accommodations regarding spelling in the IEP. Testimony of Rielly; exhibits P-33, P-34.

However, Ms. Rielly testified that the spelling goal and benchmark reflected in the IEP are not appropriate. She explained there should be a spelling assessment that would identify specific spelling areas of weakness that should be addressed by Hudson, the special education instruction in this area should then be driven by the assessment results, and the spelling goal and benchmark should then be revised to be consistent with the spelling assessment and instruction. She explained that this should lead to improving Student's spelling in the context of his written work, and not simply in isolation. Ms. Rielly provided expert, credible, persuasive and unrebutted testimony in this regard.

For these reasons, I find that the spelling goal and benchmark on Hudson's currently-proposed IEP are not appropriate.

The next issue is whether Hudson prospectively has an assistive technology consultant with sufficient qualifications to provide appropriate services to Student.

Recently, Hudson has contracted with Karen Waddill (the coordinator of the Pace Center at the Cotting School in Lexington, MA) to provide AT consultation regarding Student. Ms. Waddill has extensive expertise and experience in both technology and communication, and has provided consultation to a number of school districts. Ms. Rielly spoke favorable of Ms. Waddill. Testimony of Waddill, Rielly; exhibit P-13.

In their closing argument, Parents noted that Hudson had hired a new AT consultant (Ms. Waddill) and that “parents feel confident that Ms. Waddill has the necessary skill set.” Parents’ closing argument, page 9.

I find that it is not disputed that Hudson now has an assistive technology consultant with sufficient qualifications to provide appropriate services to Student.

The final issue is whether Hudson may be required to have its special education staff take a course entitled “Basic Rights Denial” that would be taught by an advocate chosen by Parents.

Parents provided no basis for such relief, and Parents’ request is therefore denied.

ORDER

Hudson was not required to provide Student with occupational therapy since October 21, 2009 and is not required to provide such services prospectively.

The spelling goal and related benchmarks on Student’s IEP are not appropriate and shall be modified as follows. Hudson shall first assess Student as recommended by Ms. Rielly. Student’s special education instruction regarding spelling shall then be tailored to address Student’s individual spelling needs as described by the assessment. The IEP spelling goal and benchmarks shall then be modified by the IEP Team to more precisely reflect the assessment and the focus of Student’s spelling instruction.

Hudson has an assistive technology consultant with sufficient qualifications for purposes of Hudson’s providing appropriate services to Student.

Hudson is not required to have its special education staff take a course entitled “Basic Rights Denial” that would be taught by an advocate chosen by Parents.

By the Hearing Officer,

William Crane
Dated: August 2, 2011

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS

THE BUREAU'S DECISION, INCLUDING RIGHTS OF APPEAL

Effect of the Decision

20 U.S.C. s. 1415(i)(1)(B) requires that a decision of the Bureau of Special Education Appeals be final and subject to no further agency review. Accordingly, the Bureau cannot permit motions to reconsider or to re-open a Bureau decision once it is issued. Bureau decisions are final decisions subject only to judicial review.

Except as set forth below, the final decision of the Bureau must be implemented immediately. Pursuant to M.G.L. c. 30A, s. 14(3), appeal of the decision does not operate as a stay. Rather, a party seeking to stay the decision of the Bureau must obtain such stay from the court having jurisdiction over the party's appeal.

Under the provisions of 20 U.S.C. s. 1415(j), "unless the State or local education agency and the parents otherwise agree, the child shall remain in the then-current educational placement," during the pendency of any judicial appeal of the Bureau decision, unless the child is seeking initial admission to a public school, in which case "with the consent of the parents, the child shall be placed in the public school program". Therefore, where the Bureau has ordered the public school to place the child in a new placement, and the parents or guardian agree with that order, the public school shall immediately implement the placement ordered by the Bureau. *School Committee of Burlington, v. Massachusetts Department of Education*, 471 U.S. 359 (1985). Otherwise, a party seeking to change the child's placement during the pendency of judicial proceedings must seek a preliminary injunction ordering such a change in placement from the court having jurisdiction over the appeal. *Honig v. Doe*, 484 U.S. 305 (1988); *Doe v. Brookline*, 722 F.2d 910 (1st Cir. 1983).

Compliance

A party contending that a Bureau of Special Education Appeals decision is not being implemented may file a motion with the Bureau contending that the decision is not being implemented and setting out the areas of non-compliance. The Hearing Officer may convene a hearing at which the scope of the inquiry shall be limited to the facts on the issue of compliance, facts of such a nature as to excuse performance, and facts bearing on a remedy. Upon a finding of non-compliance, the Hearing Officer may fashion appropriate relief, including referral of the matter to the Legal Office of the Department of Education or other office for appropriate enforcement action. 603 CMR 28.08(6)(b).

Rights of Appeal

Any party aggrieved by a decision of the Bureau of Special Education Appeals may file a complaint in the state court of competent jurisdiction or in the District Court of the United States for Massachusetts, for review of the Bureau decision. 20 U.S.C. s. 1415(i)(2).

An appeal of a Bureau decision to state superior court or to federal district court must be filed within ninety (90) days from the date of the decision. 20 U.S.C. s. 1415(i)(2)(B).

Confidentiality

In order to preserve the confidentiality of the student involved in these proceedings, when an appeal is taken to superior court or to federal district court, the parties are strongly urged to file the complaint without identifying the true name of the parents or the child, and to move that all exhibits, including the transcript of the hearing before the Bureau of Special Education Appeals, be impounded by the court. See *Webster Grove School District v. Pulitzer Publishing Company*, 898 F.2d 1371 (8th Cir. 1990). If the appealing party does not seek to impound the documents, the Bureau of Special Education Appeals, through the Attorney General's Office, may move to impound the documents.

Record of the Hearing

The Bureau of Special Education Appeals will provide an electronic verbatim record of the hearing to any party, free of charge, upon receipt of a written request. Pursuant to federal law, upon receipt of a written request from any party, the Bureau of Special Education Appeals will arrange for and provide a certified written transcription of the entire proceedings by a certified court reporter, free of charge.